

Domestic Courts and techno-scientific matter

- strategies and experiences in Germany-

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I. Gathering of scientific advice

In development consent cases scientific advice may be provided on 3 levels

1. Planning period

Description of the project by the developer with an *expertise* that the conditions for the consent are met

Examples: Environmental Impact Assessment according to Directive 2011/92/EU

Appropriate Assessment of the Implication according to Council Directive 92/43/EEC (FFH)

2. Decision making procedure

The public authority gathers scientific advice by

- hearing its experts
- public participation

public authorities, NGOs and other members of the public may submit their opinion regarding scientific questions

The scientific evidence presented by the developer must be verified.

3. Judicial procedure

According to *Section 86 (1) Code of Administrative Court Procedure (VwGO)* the court shall investigate the facts **ex officio**.

The scientific opinion of the parties is to be scrutinized.

According to *Section 99 (1) VwGO* the court requests the **submission of the files** which were produced in the administrative procedure (which is governed by the ex-officio principle as well)

The court may hear party-appointed and public experts.

In case of doubts the court *itself* must appoint an expert.

II. Judicial review

Article 19 (4) Basic Law (= Fundamental right on access to justice)

„Should any person's rights be violated by public authority, he may have recourse to the courts, ...“

It follows principally:

- No restriction (like limitation on obvious errors)
- No margin of interpretation in case of unspecific legal terms
- Duty to fully clarify the facts (including scientific assessment of the facts)

Exceptions require sufficient weighty factual grounds.

III. „Assessment prerogative“ in nature protection law ?

Case



versus



Legal background:

Section 44 Federal Nature Conservation Act

Provisions for specially protected fauna and flora species and certain other fauna and flora species

„(1) It is prohibited:

- 1. to pursue, capture, injure or kill wild animals of specially protected species, or to take from the wild, damage or destroy their developmental stages,*

...“

Federal Constitutional Court (Decision from 23 October 2018):

“If the judicial control, after the greatest possible clarification, reaches the limit of the state of knowledge of nature conservation science and practice, Article 19.4 sentence 1 of the Basic Law does not force the court to further investigations, but allows it to base its decision in this respect on the plausible assessment of the authority on the technical question. The restriction of control here does not follow from an assessment prerogative granted to the administration and does not require a specific statutory authorisation.”